D.T.E. 01-63-A

Petition of the Cape Light Compact For Approval of a Municipal Aggregation Default Service Pilot Project

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ORDER ON MOTION FOR RECONSIDERATION

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FOR: THE CAPE LIGHT COMPACT

I. INTRODUCTION AND PROCEDURAL HISTORY

On October 31, 2001, the Cape Light Compact ("Compact")[1] filed with the Massachusetts Department of Telecommunications and Energy ("Department") a motion seeking reconsideration of the Department's Order in Cape Light Compact Default Service Pilot Project, D.T.E. 01-63 (2001) ("Motion"). On November 14, 2001, Duke Energy Trading and Marketing, LLC ("Duke") filed comments in opposition to the Motion.

On October 23, 2001, the Department issued D.T.E. 01-63 ("Order"), approving the Compact's proposal to implement a default service pilot project ("Pilot Project" or "Pilot"), pursuant to Section 339 of the Acts of 1997 ("Electric Restructuring Act" or "Act"). Through the Pilot Project, the Compact seeks to provide electric power supply to approximately 42,000 default service customers within its twenty-one member communities. Although the Department approved the Pilot Project, we noted our concern that certain aspects of programs such as the Pilot may have a chilling effect on suppliers entering the competitive generation market in the Commonwealth. D.T.E. 01-63 at 6. To mitigate against this effect, the Department directed the Compact to compile an information list of consumers who are participating in the Pilot (including name, address and rate class) and make that list available to licensed competitive suppliers upon request. Id. at 7. In addition, the Department informed the

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[1] The Cape Light Compact was formed in 1997 through an intergovernmental agreement of twenty-one towns and two counties for the purpose of establishing competitive power supply, energy efficiency, and consumer advocacy. The member towns consist of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, and Yarmouth.

Compact that, if it submitted a power supply agreements that included an "exit fee" provision, the Department would reject the agreement, stating that such a fee is incompatible with an opt-out approach to aggregation and has clear anti-competitive implications. Id.

II. POSITION OF THE PARTIES

A. THE COMPACT

The Compact's Motion requests that the Department modify the conditions established in D.T.E. 01-63 regarding the availability of consumer information and the prohibition against exit fees (Motion at 1, 8). The Compact contends that these two conditions, if not modified or withdrawn, will have an adverse effect on the ability of competitive suppliers to serve consumers participating in the Pilot Project, and will likely prevent the Compact from consummating a power supply agreement with a supplier for the Pilot (id. at 1-2). The Compact asserts that these conditions are "simply at odds with the realities of the competitive market" as it currently exists, and will continue to exist in the near-term, in Massachusetts (id. at 2, 4).

The Compact asserts that the condition requiring the Compact to make Pilot participant information available to licensed suppliers will increase costs of implementing the Pilot, and may deter suppliers from serving customers in the Pilot (id. at 4-5). The Compact emphasizes that no other competitive supplier is required to provide this information about its customers to other suppliers (id.). The Compact states that, because the supplier that serves the Pilot will be required to provide supply for the full load of Pilot participants, potential suppliers will factor into their prices the risk associated with the uncertainty of what this full-load requirement will

be over the term of the Pilot. The Compact asserts that, although this risk is considerable, suppliers can evaluate the risk "based on usual market conditions and the relationship the supplier plans to build with its customers" (id.). However, the Compact further argues that assessing the risk will be "difficult or impossible if the supplier also faces the prospect of advertising the list of participating customer to other suppliers" (id.).

With regard to exit fees, the Compact argues that such a provision usually is the subject of negotiations with potential suppliers, along with price of supply, guarantees for savings and other economic terms (id. at 5-6). The Compact states that its Pilot Project proposal was silent on whether charges would be applied to participants that leave the Pilot for another competitive supplier[2] because it was reserving that issue for negotiations with interested suppliers. The Compact asserts that the Department's condition prohibiting an exit fee inappropriately denies the Compact the ability to include this issue in negotiations. The Compact argues that the Department's condition may act to dissuade suppliers from serving the Pilot, given that suppliers may impose such a fee in other contracts (id.).

B. Duke Energy Trading and Marketing, LLC

Duke requests that the Department deny the Compact's Motion, arguing that application of an exit fee is anti-competitive (Duke Comments at 1, 3). Duke argues that an exit fee creates barriers to market entry (id. at 3). Duke further argues that an exit fee "directly infringes on the right of consumers to choose their service provider" (id.). Duke contends that the

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[2] The Compact notes that consumers would be able to return to default service at any time with no charge (id. at 5).

application of an exit fee in the context of the Pilot fails to "strike the appropriate balance between the utility of empowering consumers through aggregation . . . and the value of consumer choice embodied in the Electric Restructuring Act" (id. at 4). Even if consumers need aggregation, Duke argues that an exit fee is not appropriate because it "strengthens the hold of the existing supplier at the expense of consumer choice" (Duke Comments at 6).

III. STANDARD OF REVIEW

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based

on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

IV. ANALYSIS AND FINDINGS

The Department's standard for reconsideration is well-established. A party must show that extraordinary circumstances require that the Department take a fresh look at the record. A motion for reconsideration should bring forth previously unknown or undisclosed facts which would have a significant impact upon the decision already rendered. A party may not seek to reargue issues argued and considered. We will also consider a motion for reconsideration when our treatment of an issue is arguably the result of mistake or inadvertence.

The Compact's motion for reconsideration is based on the claim that, due to the conditions established by the Department's Order in D.T.E. 01-63, the Company will be unable to finalize a power supply agreement to serve the Pilot Project, thus depriving default service customers on Cape Cod of the benefits of municipal aggregation as established by the Electric Restructuring Act. By requiring the Compact to make information about Pilot participants available to competitive suppliers and by precluding exit fees, the Compact argues that we may have hindered its ability to implement the Pilot. The likely hindrance and possible failure of the Pilot, as presented by the Compact, is a previously unknown or undisclosed fact that has had a significant impact upon the decision already rendered. This new information

dictates that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation.

With respect to the issue of customer lists, in Competitive Market Initiatives, D.T.E. 01-54-A (2001), the Department directed distribution companies to compile customer information lists for their standard offer service and default service customers, to be made available to licensed competitive suppliers upon request.[3] In the second phase of this proceeding, the Department is currently investigating whether the customer information lists should be expanded to include information for customers of competitive suppliers.

In light of the Department's ongoing investigation in D.T.E. 01-54, we determine that it is unnecessary to require the Compact to compile an information list of consumers who are participating in the Pilot and make that list available to licensed competitive suppliers upon request. Instead, the issue of whether information about customers of competitive suppliers should be made available to other suppliers will be addressed generically in the second phase of D.T.E. 01-54. This generic investigation will appropriately ensure that Pilot participants will be treated in the same manner as other customers of competitive suppliers. Therefore, upon reconsideration, the Department will not require the Compact to provide information about Pilot participants to suppliers at this time.

In D.T.E. 01-63, the Department concluded that the application of an exit fee is unacceptable because it is incompatible with an opt-out approach to aggregation and has clear anti-competitive implications. D.T.E. 01-63, at 7 (2001). However, the Compact argues that

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[3] D.T.E. 01-54-A was issued on October 15, 2001, prior to the issuance of D.T.E. 01-63.

any restriction on its ability to negotiate the terms of an exit fee with a electricity supplier likely will hinder and potentially defeat the Compact's ability to implement the Pilot. This was not the Department's intent.

The Electric Restructuring Act addresses the issue of exit fees in the context of municipal aggregation, providing that participants in a municipal aggregation program who decide to leave the program "within 180 days may do so without penalty." G.L. c. 164, § 134(a). Thus, the Act does not preclude the use of exit fees in municipal aggregation programs, but requires that program participants be provided a specified time period to leave the program without incurring such a fee. Upon reconsideration, we find that whether exit fees should be included in a power supply agreement is an appropriate subject of negotiations with potential suppliers, along with other pricing terms and conditions, and should be evaluated in the context of the overall agreement. Neither the Department nor the governing board members[4] of the Compact who represent their communities will approve a contract unless there are demonstrated savings and other consumer protections (Compact Reply Comments at 6-7). Following approval by the Department, each individual member town may sign or reject the contract (Compact Pilot Project Filing, Attachment 1, § 4.1.3). While we have stated that pilot programs designed pursuant to Section 339 of the Act need not meet each requirement of G.L.

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[4] The Compact is governed by a board made up of one representative for each member town (often a selectman), one representative for Dukes County, and a County Commissioner appointed by the Barnstable County Board of Commissioners (Compact's Report in Support of Aggregation Plan, at 7).

c. 164, § 134, the Compact will have a heavy burden if a contract is offered that is inconsistent with the provisions of G.L. c. 164, §134(a).

As we have stated in D.T.E. 01-63, pilot programs are, in general, provided a certain level of flexibility to differ from existing programs in order to provide information that may be useful to improve the manner in which the existing programs are designed and implemented in the future. Order at 5. The limited scale and 15-month term of the Pilot Project will give the Department and others an opportunity to study the effects of the Pilot with respect to the development of the competitive market.

V. ORDER

After review and consideration, it is

ORDERED: That the Motion of the Cape Light Compact for Reconsideration of the Department's Order in D.T.E. 01-63 is GRANTED.

By Order of the Department,

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner